IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA DAVENPORT DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No. 3:01-cr-0029-JAJ

vs.

PARIS HOLLINGSHED,

Defendant.

ORDER

This matter comes before the court pursuant to the government's May 29, 2007 motion for revocation of supervised release for defendant Paris Hollingshed (docket number 29). The government filed its brief in support of its motion on January 9, 2008 (docket number 42). Defendant filed his response on January 10, 2008 (docket number 45). Final hearing on the government's motion for revocation of supervised release is set for January 18, 2008.

Procedural History

On July 20, 2001, the defendant was sentenced to 78 months imprisonment and 48 months supervised release following his guilty plea to possession with intent to distribute cocaine base. Defendant's term of supervised release commenced on December 30, 2005. The record reveals that the defendant violated his terms of supervised release on several occasions by his continued drug use and on February 22, 2007, the defendant's conditions of release were modified by court order to include his residence in the Residential Re-Entry Center (a halfway house) for 120 days. On May 17, 2007, the defendant walked away from the Residential Re-Entry Center without permission and failed to return until arrested on a warrant on December 27, 2007.

Summary of the Arguments

The government argues that the defendant's placement at the halfway house pursuant to a court order while on supervised release constituted "custody" under 18

U.S.C. § 751(a), his "escape" from which is a crime of violence and an offense punishable by a term of imprisonment of not more than five years pursuant to U.S.S.G. §7B1.1(a)(1).

Case 3:01-cr-00029-JAJ

The defendant argues that his placement at the halfway house does not constitute "custody" under 18 U.S.C. § 751(a), noting that court ordered residence in a halfway house is not considered "custody" for other purposes, such as calculating time served toward a prison sentence under 18 U.S.C. § 3585.

Conclusions of Law

At issue is whether the defendant's walking away from the halfway house constitutes "escape," in violation of 18 U.S.C. § 751(a), which is an offense punishable by a term of imprisonment of not more than five years, a crime of violence, and a Grade A violation under United States Sentencing Guideline (U.S.S.G.) §7B1.1(a)(1). Title 18 U.S.C. § 751 (a) provides:

Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined under this title or imprisoned not more than five years, or both; or if the custody is for extradition, or for exclusion or expulsion proceedings under the immigration laws, or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined under this title or imprisoned not more than one year, or both.

As set forth above, the government argues that the defendant "escaped" when he walked away from the halfway house because his residence at the halfway house was a court-ordered placement and was sufficiently restrictive to constitute "custody" under 18 U.S.C. § 751(a). The parties agree that the United States Court of Appeals for the Eighth

Circuit has not squarely addressed this issue. The government relies primarily on a decision with nearly identical facts from the United States Court of Appeals for the Tenth Circuit, which held the defendant was in custody within the meaning of the escape statute while subject to court order to reside in a halfway house. See United States v. Sack, 379 F.3d 1177 (10th Cir. 2004). The government predicts that the Eighth Circuit would reach the same conclusion as the Tenth Circuit, noting other decisions by the Eighth Circuit addressing "escape" in different contexts. See e.g., United States v. Nace, 334 F.2d 235 (8th Cir. 1964) (finding that defendant, who was in the custody of the Attorney General, but allowed to serve his sentence at a halfway house, was in "custody" for purposes of the "escape" statute notwithstanding the freedom allowed him at the halfway house); McCullough v. United States, 369 F.2d 548 (8th Cir. 1966) (holding that defendants' walking away from halfway house constituted an "escape" from custody of the Attorney General under 18 U.S.C. § 751(a) where the defendants were duly confined to the halfway house by written orders of the Bureau of Prisons, an agency of the United States Department of Justice, headed by the Attorney General); United States v. Cluck, 542 F.2d 728 (8th Cir. 1976) ("Although there must be an escape from custody, it is not necessary that the escapee at the time of the escape be held under guard or under direct physical restraint or that the escape be from a conventional penal housing unit such as a cell or cell block; the custody may be minimal and, indeed, may be constructive.").

The plain language of 18 U.S.C. § 751(a) defines "escape" to include "custody under or by virtue of any process issued . . . by any court, judge, or magistrate judge . . . of the United States." The defendant's residence at the halfway house, while consented to by the defendant, was ordered by Judge Pratt on February 22, 2007. Eighth Circuit precedent instructs that custody for purposes of the federal "escape" statute may be "minimal" and "constructive." Cluck, 542 F.3d at 736. Further, the holding by the United States Supreme Court that time spent in a halfway house is not "official detention"

for which a defendant earns credit for time served, is a separate and distinct question. The court finds that the defendant's court-ordered placement at the Davenport Residential Re-Entry Center constituted "custody," and his walking away from the halfway house an "escape" in violation of 18 U.S.C. §751(a).

The defendant argues that the Eighth Circuit has, however, indicated in dicta that a defendant's walking away from a halfway house would not constitute "escape." See Hayes v. United States, 281 F.3d 724 (8th Cir. 2002) (citing United States v. Swanson, 253 F.3d 1220, 1223-24 (10th Cir. 2001)). The court notes that the Eighth Circuit's aforementioned remark in Hayes was dicta, as the issue in Hayes was whether the defendant's failure to report to a halfway house as required by her conditions of bond constituted obstruction of justice within the meaning of the sentencing guidelines. In apparent support of this dicta, the Eighth Circuit cited the decision of the Tenth Circuit in Swanson, 253 F.3d at 1223-24. However, Swanson addressed whether a defendant's walking away from a halfway house constituted obstruction of justice under U.S.S.G. § 3C1.1, Note 4(e), which applies to "escaping or attempting to escape from custody before trial or sentencing." While recognizing that the definition of "custody" under a guidelines analysis may be broader than the definition of "custody" under the felony escape statute, the Tenth Circuit nonetheless recognized that "one who lives [at a halfway house] under court order is not free to come and go at will" and that residence at a halfway house is a form of "custody." Id. at 1223-24. In Sack, the Tenth Circuit subsequently answered the question squarely at issue in the instant case and found that the defendant was in "custody" within the meaning of the escape statute while subject to order to reside in a halfway house. Moreover, the court is not convinced that the Ninth Circuit's decision in United States v. Baxley, 982 F.2d 1265 (1992) mandates a different conclusion. In Baxley, which involved a defendant's pre-trial residence in a halfway house, the court noted that the restrictions placed on the defendant at the halfway house were slight and that the district court in its "Order Setting Conditions of Release" not check the box that stated that "the defendant is placed in the custody of" a given institution, thereby indicating that the district court did not intend to place the defendant in "custody."

While pretrial detention seems like punishment to those detained, it is not. Pretrial detention pursuant to the Bail Reform Act of 1984 is ordered when the court "finds that no condition or combination of conditions will reasonably assure the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(e). Thus, residence at a halfway house as a condition of release may be ordered by the court to reasonably assure the appearance of the defendant at trial or to protect the safety of the community, but it is not ordered as punishment. It reasonably follows, then, that **pretrial** placement at a halfway house may not be considered "custody" for purposes of determining an "escape" or "official detention" for calculating credit for time served. To the contrary, when revoking a term of supervised release or imposing sentences at the low total offense levels of the Sentencing Guidelines, the law permits the court to sentence defendants to prison and/or halfway house placement as punishment.

Upon the foregoing,

IT IS ORDERED that the defendant's court-ordered placement at the Davenport Residential Re-Entry Center constituted "custody," and his walking away from the halfway house an "escape" in violation of 18 U.S.C. §751(a).

DATED this 18th day of January, 2008.

SOUTHERN DISTRICT OF IOWA